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CITATIONS

663297—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 244

AGNES SCHONGALLA, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF WILLIAM SCHONGALLA, DECEASED, PETITIONER

v.

HARRY M. HICKEY, UNITED STATES COLLECTOR OF INTERNAL REVENUE, FOURTEENTH DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinions of the District Court (R. 81, 99), one after reargument, are not officially reported. The opinion of the Circuit Court of Appeals (R. 150) has not yet been officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 18, 1945. (R. 158.) The petition

for a writ of certiorari was filed on July 19, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the proceeds of certain life insurance policies taken out by the decedent upon his own life were properly included in the value of his gross estate for estate tax purposes, under Section 302 (g) of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and regulations are printed in the Appendix, *infra,* pp. 10–11.

STATEMENT

The facts found by the District Court (R. 130–136), in substance, are as follows:

The taxpayer, as executrix, sues to recover estate taxes and interest, allegedly overpaid on the estate of William Schongalla, a resident of New York, who died January 12, 1938, and was survived by his wife, two sons and his mother (R. 130).

In addition to other life insurance, aggregating more than $40,000, payable to beneficiaries other than his estate, there were in force upon the decedent's life at the time of his death two policies issued by Union Central Life Insurance Company, dated May 20, 1924, the proceeds of each

of which were $30,100.05, a policy issued by Metropolitan Life Insurance Company, dated October 20, 1903, the proceeds of which were $3,228.89, and an industrial policy issued by Metropolitan Life Insurance Company, dated October 10, 1892, the proceeds of which were $112.19. All premiums on all of the policies were paid by the decedent or by a corporation of which he was the sole stockholder. (R. 130.)

The decedent had purchased the two Union Central Life Insurance Company policies in furtherance of a comprehensive general insurance "trust fund" plan then being arranged to meet his requirements. They were of the endowment type and identical in terms, except that one of the sons was named as beneficiary in one policy and the other son as the beneficiary in the other. Each policy, as written, provided that upon the maturity date, July 12, 1959, or if the insured should die prior thereto, the proceeds should be paid to the beneficiary, or to the beneficiary's executors, administrators or assigns. (R. 131.) These policies, as originally written, did not reserve the right to change the beneficiaries. The policies were issued in this manner, at the instance of the writing agent of the company, because he realized that the company would not issue a policy containing the language covering the decedent's "trust fund plan", and it was intended to incorporate the necessary provisions subsequently through the medium of a

supplementary agreement relating to the settlement option; and such agreement was possible only if the right to change the beneficiary had been reserved. The agent knew the wishes of the insured and he chose the procedure to be followed to give effect thereto; he intended to have insurance contracts prepared and delivered, and further intended to amend them by making substantial changes therein. The insured knew the procedure used, and accepted the policies, although he had the option of accepting or rejecting them in their entirety. (R. 131–132.)

Each of the Union Central Life Insurance Company's policies provided, in paragraph 33, that none of the terms of the policy could be modified except by an agreement in writing signed by a specified officer of the company; in paragraph 34, that the owner of the policy, by written notice to the company, for which a form would be furnished on request, could elect to have the proceeds of the policy payable, in lieu of a single sum, in either of several ways known as "Settlement Options". Paragraph 37 contained "Option 3. Retained at interest". (R. 132.)

After issuance of the Union Central Life Insurance Company's policies, and in order to conform them to his wishes and insurance plan, the insured, as owner (under paragraph 34) exercised his right to elect a "Settlement Option" by executing, upon forms furnished by the company for that purpose, an agreement with respect to each

policy (R. 132–133), which agreement provides (R. 133):

> I hereby give notice of change of beneficiary and election of settlement option under the above described policy and request payment of the net sum payable under the said policy in the event of the death of the insured as follows:
>
> The net sum payable under the above numbered policy, in the event of my death before it matures as an endowment, shall be retained by the Company in accordance with the provisions of Settlement Option #3 in said policy, * * *
>
> * * * * *
>
> In the event I survive my said son, said net sum shall be paid to my executors, administrators or assigns.
>
> Except as hereinbefore provided, no benefit accruing to any beneficiary under this agreement shall be transferable, or subject to commutation or encumbrance, or to legal process.

The agreements are dated May 20, 1924 (the date of the issuance of the policies), and are signed by the decedent, as the insured, and were accepted by the insurance company, by a proper officer thereof, September 8, 1924. Payments of the proceeds of each of the policies have been, and are being, paid in accordance with these agreements since the death of the insured. (R. 133.)

The policy issued by the Metropolitan Life Insurance Company, dated October 20, 1903, named the decedent's mother as beneficiary "if living, otherwise to the legal representatives of the insured." The policy provides that after premiums thereon had been paid for three or more years, the company would grant, as the insured and assured may elect, one of the following options: (a) a loan; (b) the cash surrender value; (c) a paid-up policy. (R. 133–134.)

The other policy issued by the Metropolitan Life Insurance Company, dated October 10, 1892, was of the so-called industrial type. No named beneficiary was designated therein. It provided for a weekly premium payment, and contains a so-called facility of payment clause permitting payment of the proceeds of the policy to either the executor or administrator, husband or wife, or any relative by blood or lawful beneficiary of the insured. It provided that after it had been in force for five years and after the insured had reached the age of eighteen years, the insured might make written application for a paid-up term policy payable to the estate of the insured. (R. 134.)

An estate tax return, in which the four policies hereinbefore described were listed but their proceeds not included in the value of the gross estate, was filed in behalf of the decedent's estate. The Commissioner of Internal Revenue ruled that the

proceeds of the policies should be included in the value of the gross estate; that determination, together with other adjustments not involved in the present proceeding, resulted in a deficiency of $17,315.30. (R. 134–135.)

The judgment of the District Court (R. 145) dismissing the taxpayer's complaint, was affirmed on appeal (R. 158).

ARGUMENT

1. Petitioner states (Pet. 8) that the decision of the Circuit Court of Appeals is in conflict with two decisions of the Circuit Court of Appeals for the Eighth Circuit in *Walker* v. *United States,* 83 F. 2d 103, and *Helvering* v. *Parker,* 84 F. 2d 838, and with the decisions of this Court in *Bingham* v. *United States,* 296 U. S. 211, and *Industrial Trust Co.* v. *United States,* 296 U. S. 220.

All of those cases were decided several years before this Court's decision in *Helvering* v. *Hallock,* 309 U. S. 106, which recognized that the retention of rights contingent upon survivorship furnished the basis for the imposition of estate taxes with respect to property transferred by the decedent during his life time.

Since the *Hallock* decision, like results have been reached in cases of insurance proceeds where the insured had rights contingent upon survivorship. *Chase Nat. Bank* v. *United States,* 116 F. 2d 625 (C. C. A. 2d); *Liebmann* v. *Hassett,* 148

F. 2d 247 (C. C. A. 1st); *Commissioner* v. *Washer*, 127 F. 2d 446 (C. C. A. 6th), certiorari denied, 317 U. S. 653; *Bailey* v. *United States*, 31 F. Supp. 778 (C. Cls.), certiorari dismissed, 311 U. S. 721. The decision below is not in conflict with any authoritative decision of another Circuit Court of Appeals. It is in harmony with the doctrine of the *Hallock* case, as recently applied by this Court in *Goldstone* v. *United States*, decided June 11, 1945, No. 699, October Term, 1944, not yet reported.[1]

2. Whether a certain amendment of the insurance policies was properly treated as a reformation does not present a substantial question requiring the intervention of this Court. Since it ultimately turns upon whether a mistake was made in the insurance application the question depends upon the facts of this particular case and thus is not of general importance.

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[1] The decisions in the *Bingham* and *Industrial Trust* cases must be read in the light of the subsequent decision in the *Hallock* case. It may be noted that the petition for certiorari in *Commissioner* v. *Washer*, *supra*, similarly relied upon an alleged conflict with the *Bingham* and *Industrial Trust* decisions.

CONCLUSION

The decision below is correct. There is no conflict or any other sufficient basis for a review by this Court. The petition should therefore be denied.

Respectfully submitted.

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AUGUST, 1945.